

**2010 Labor Law Update**

**Brian J. Moore**

## 2010 Labor Law Update

Brian J. Moore  
Dinsmore & Shohl LLP  
Huntington Square  
900 Lee Street, Suite 600  
Charleston, WV 25301  
(304) 357-0900  
(304) 357-0919  
brian.moore@dinslaw.com

### **Peters v. River's Edge Mining, Inc., 680 S.E.2d 791 (W.Va. 2009)**

#### **Labor Law Issues:<sup>1</sup>**

(1) **Preemption.** Whether the plaintiff's workers' compensation discrimination claims under W.Va. Code §§ 23-5A-1 and 23-5A-3<sup>2</sup> are preempted by federal labor law because the employer's stated reason for discharging the plaintiff -- that he incurred two consecutive unexcused absences -- requires interpretation of the relevant collective bargaining agreement?

(2) **Collateral estoppel.** Whether the plaintiff is estopped from litigating his workers' compensation discrimination claims where the parties had previously arbitrated the issue of whether the employer had "just cause" under the collective bargaining agreement for terminating the plaintiff's employment?

#### **Brief Summary:**

(1) **Preemption.** The Supreme Court of Appeals of West Virginia ("Supreme Court of Appeals") held that the plaintiff's workers' compensation discrimination claims were not preempted because they did not require interpretation of a collective bargaining agreement, reaffirming its prior precedent in *Yoho v. Triangle PWC*, 336 S.E.2d 204 (W.Va. 1985), and extending that holding to cover claims under W.Va. Code § 23-5A-3.

(2) **Collateral estoppel.** The Court held that the employer's collateral estoppel argument lacked merit because the issue decided in the arbitration -- whether there was "just cause" under the contract -- and the issue at stake in the litigation -- whether the employer's stated reason for terminating the plaintiff was pretextual -- were completely different.

---

<sup>1</sup> This summary discusses only the labor law issues decided in *Peters*. In addition to holding that the plaintiff's claims were not preempted by federal labor law, and were not barred by collateral estoppel based on an earlier arbitration decision, the Supreme Court of Appeals also analyzed and upheld front pay and punitive damage awards against the employer.

<sup>2</sup> W.Va. Code § 23-5A-1 prohibits discrimination by any employer towards a present or former employee based on his or her receipt of, or attempt to receive, workers' compensation benefits. W.Va. Code § 23-5A-3 provides that it "shall be a discriminatory practice . . . to terminate an injured employee while the injured employee is off work due to a compensable injury . . . and is receiving or is eligible to receive temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense."

## **Facts and Procedural Background:**

The plaintiff sustained a compensable injury under the West Virginia Workers' Compensation Act and, as a result, was off work for a period of time. The plaintiff's physician released him to return to work on May 7, 2004. During the preceding week, the plaintiff had communicated with one of the employer's management officials that it was possible he could return to work soon. On, May 10, 2004, that official called the plaintiff to let him know that the employer would be able to place the plaintiff into a transitional work program. The official also advised the plaintiff to attend a functional capacity evaluation scheduled for that day. Meanwhile, another company official attempted to reach the plaintiff that same day to let him know that he had been approved to return to work. The official left three messages with the plaintiff's mother indicating that the plaintiff could return to work (the plaintiff had provided his mother's phone number as his contact number, but he did not live with her). The plaintiff received these messages on May 11, 2004. On the morning of May 12, 2004, the plaintiff had several phone conversations with the company official who had left the messages. The parties dispute the contents of these phone conversations. According to the company official, he instructed the plaintiff to report to work that day to avoid violating the "two day rule" under the collective bargaining agreement. According to the plaintiff, the official indicated to him that he could return to work on May 13, 2004. In any event, the plaintiff did not report to work until May 13, 2004. The employer discharged him for violation of the "two day rule." The parties arbitrated the matter, and the arbitrator upheld the employer's decision. The plaintiff subsequently filed a civil action in the Circuit Court of Boone County, alleging retaliatory discharge under the workers' compensation laws.

The employer moved for summary judgment, arguing that the plaintiff's claims were preempted by Section 301 of the Labor Management Relations Act because resolution of such claims required interpretation of the collective bargaining agreement's two day rule. The Court denied the motion, stating "I do not think that we're going to be asking the jury to interpret the contract . . . we're just going to be asking them to settle factual matters."

After the jury returned a \$1.8 million dollar verdict in the plaintiff's favor, and the employer's post-trial motions were denied, the employer appealed, arguing, among other things, that (1) the trial court erred as a matter of law in deciding the preemption issue and (2) the trial court erred as a matter of law in determining that collateral estoppel did not bar the plaintiff's claims.

## **Analysis and Holdings:**

**(1) Preemption.** The Supreme Court of Appeals first noted that Section 301 of the Labor Management Relations Act "affords federal courts jurisdiction over cases involving the interpretation of a collective bargaining agreement." Then, the Court cited its earlier decision in *Yoho v. Triangle PWC*, 336 S.E.2d 204 (W.Va. 1985), in which it held that discrimination claims under W.Va. Code § 23-5A-1 are not preempted because such claims do not require interpretation of a collective bargaining agreement for their resolution. The Court then addressed the employer's arguments that (1) U.S. Supreme Court decisions after *Yoho* require

determination of the preemption issue on a case-by-case basis; and (2) that *Yoho* did not address preemption of claims under W.Va. Code § 23-5A-3, which had not been enacted yet.

First, the Court noted that none of the Supreme Court precedent cited by the employer actually overruled its decision in *Yoho*, and that the Court had already adopted a case-by-case approach to preemption issues. Therefore, the Court held that *Yoho* "remains good law and is determinative of our resolution of the issues presented by this assignment of error."

Next, the Court held that claims under W.Va. Code § 23-5A-3 were likewise not preempted. "Reading and applying W.Va. Code § 23-5A-3 consistently with W.Va. Code § 23-5A-1, we conclude that the same reasoning should apply to the additional claim asserted by [the plaintiff] in this case under W.Va. Code § 23-5A-3(b), which claim did not exist when we decided *Yoho*."

**(2) Collateral estoppel.** The Court noted that "collateral estoppel, or issue preclusion, forecloses the relitigation of 'issues that were actually litigated in an earlier suit even though the causes of action [in the former and subsequent proceedings] are different.'" (Citation omitted; brackets used by the Court). The Court then cited its previous holding in Syllabus point 1 of *State v. Miller*, 459 S.E.2d 114 (1995), that:

Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Addressing the first factor, the Court held that the issue involved in the arbitration was different than the issue involved in the court case. According to the Court, the issue in the arbitration proceeding was whether the employer terminated the plaintiff for violating the "two day rule" in the collective bargaining agreement. In contrast, the issue in the court case was "under our workers' compensation discrimination statutes, whether [the employer's] termination of [the plaintiff] based upon his violation of the 'two-day rule' was pretextual." Therefore, the Court held "because these issues are different, they are not identical as required by the first factor of *Miller*," and the doctrine of collateral estoppel does not apply.

#### **Relevant Syllabus Points:**

7. "An action for wrongful termination under W.Va. Code § 23-5A-1 (1981) is not pre-empted by federal labor law." Syllabus point 2 of *Yoho v. Triangle PWC, Inc.*, 175 W.Va. 556, 336 S.E.2d 204 (1985).

8. An action for wrongful termination under W.Va. Code § 23-5A-3 (1990) (Repl. Vo. 2005) is not preempted by federal labor law.

9. "Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." Syllabus point 1, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

10. "The application of the doctrine of collateral estoppel is discretionary with the trial court[.]" Syllabus point 7, in part, *Conley v. Spillers*, 171 W.Va. 584, 301 S.E.2d 216 (1983).

**Gary W. Muffley, Regional Director, Ninth Region, NLRB, on behalf of the NLRB v. Spartan Mining Company, et al., 570 F.3d 534 (4th Cir. 2009)**

**Issues:**

Whether the District Court properly issued Section 10(j) interim injunctive relief pending final determination by the National Labor Relations Board ("NLRB" or "the Board") as to whether Spartan Mining Co. d/b/a Mammoth Coal Co. ("Mammoth") and Massey Energy Company ("Massey") ("the respondents") committed unfair labor practices by discriminating against union members when hiring a workforce following the companies' acquisition of coal mining operations in Cannelton, West Virginia from Horizon Natural Resources Co. ("Horizon")?

**Brief Summary:**

The Fourth Circuit affirmed in its entirety the District Court's Order granting in part, and denying in part, the petitioner's request for interim injunctive relief. Specifically, the Circuit Court affirmed the District Court's decision: (1) ordering the respondents to offer interim employment to the alleged discriminatees in light of its finding that, due to the relatively high age of the workforce, many of the alleged discriminatees would retire before the Board issued its final determination; but (2) declining to order interim bargaining, rescission of terms and conditions of employment, and other relief requested by the petitioner, because it found that support for the UMWA would not be irreparably diminished by the passage of time.

**Facts and Procedural Background:**

In August 2004, the respondents acquired a coal mining operation from Horizon on its Cannelton/Dunn property after Horizon filed for bankruptcy. The respondents purchased the operation "free and clear" of the collective bargaining agreement under which employees at the property had worked. All employees were laid off in September 2004. On December 3, 2004, Mammoth began hiring a new workforce for the mining operation in Cannelton. The UMWA, which had represented the former Cannelton employees, filed a charge with the NLRB alleging that Mammoth committed unfair labor practices by discriminating against union members when considering their applications for employment.

After a sixteen day hearing, the Administrative Law Judge made findings of fact that, among other things, Massey officials made it known to applicants that that the Mammoth operation would be union-free and that a spreadsheet used in the hiring process listed little information about former Cannelton employees other than their length of "union time." Based on these findings, the ALJ ruled that Mammoth had discriminatorily denied employment to the alleged discriminatees. While Mammoth offered several non-discriminatory reasons for why it did not hire the workers, the ALJ dismissed these as "shifting" and "contradictory." Thus, the ALJ held that the respondents violated Sections 8(a)(1) and 8(a)(3) of the NLRA by discriminatorily refusing to hire the Cannelton bargaining unit employees. The ALJ also determined that the respondents unlawfully failed to recognize and bargain with the UMWA, and unlawfully changed the terms and conditions of employment without first bargaining to impasse with the Union. The respondents sought review by the NLRB. Pending such review, but after an extended length of time, the Board sought interim injunctive relief in the United States District Court for the Southern District of West Virginia. As noted, above, the District Court granted, in part, the relief sought by the Board. The respondents appealed, claiming that the injunctive relief was inappropriate. The Board cross-appealed, arguing that additional relief should have been granted.

### **Analysis and Holdings:**

First, the Court considered Mammoth's argument that neither the Circuit nor the District Court could consider the case because the Board had improperly delegated the power to seek § 10(j) relief to its General Counsel. The Fourth Circuit affirmed the District Court's holding that the National Labor Relations Act ("NLRA" or "the Act") expressly authorizes such a delegation. The Court cited Section 3(d) of the NLRA, which states that the General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under [§ 10 of the NLRA] . . . and shall have such other duties as the Board may prescribe." Mammoth acknowledged that every court that had addressed the issue found that this language was sufficient to allow the Board to delegate to the General Counsel authority to pursue Section 10(j) injunctive relief. It argued, however, that the statutory language only allowed for the delegation of *duties*, and not fundamental *powers*. Mammoth then equated duties with "prosecutorial" functions and powers with "adjudicative" functions, and cited the general rule that the Board cannot delegate its adjudicative functions. According to the Court, "the central question, then, is whether the ability to seek § 10(j) relief is prosecutorial or adjudicative in nature. This ability seems to us, as it has to all other courts, clearly prosecutorial: seeking § 10(j) relief from a district court adjudicates nothing. Whether the Board or the General Counsel petitions a district court for relief, the adjudicative function - the ultimate decision to grant relief - lies with the district court." Thus, the Court rejected Mammoth's argument in this regard.

Next, the Court considered Mammoth's argument that the District Court applied the improper standard in deciding whether to issue injunctive relief. Under Section 10(j), a district court shall award temporary injunctive relief "as it deems just and proper." 29 U.S.C. § 160(j) (2006).

The District Court utilized a two-step approach, which focused on (1) whether there is "reasonable cause to believe that an unfair labor practice has been committed," and (2) whether

injunctive relief would be "just and proper." Mammoth argued that the District Court should have utilized the four part test outlined in *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 195-196 (4th Cir. 1977), which weighs the following equitable factors: (1) the possibility of irreparable injury to the moving party if relief is not granted; (2) the possible harm to the nonmoving party if relief is granted; (3) the likelihood of the moving party's success on the merits; and (4) the public interest. In support of this argument, Mammoth cited the U.S. Supreme Court decision of *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), which held that, unless directed otherwise by Congress, courts should exercise their traditional equitable discretion in deciding whether to grant injunctive relief.

The Fourth Circuit agreed that the four-factor *Blackwelder* test should be used to determine entitlement to Section 10(j) injunctive relief. "In light of *Romero-Barcelo*, we believe that, in determining if a § 10(j) injunction should issue, the traditional four-part equitable test should govern what relief is 'just and proper.' Therefore, district courts are to utilize the *Blackwelder* factors in conducting the 'just and proper' analysis and need not undertake a separate 'reasonable cause' inquiry to determine whether to issue a § 10(j) injunction."

Although the District Court did not utilize the *Blackwelder* standard, the Fourth Circuit found that no harm had accrued to Mammoth as a result. First, the Court noted that the District Court's use of a "reasonable cause" component was essentially immaterial because Mammoth had conceded that reasonable cause existed, and because the "reasonable cause" factor essentially parallels the "success on the merits" factor of the four-part test. Next, the Court noted that, even though the District Court did not explicitly use the four-part test, it nevertheless incorporated the same equitable principles into its "just and proper" analysis. Consequently, the Fourth Circuit rejected Mammoth's argument that the District Court's application of the wrong standard required reversal.

Turning to the merits of whether temporary injunctive relief should have been issued, the Fourth Circuit held that the District Court properly balanced the potential harms to the parties. According to the Court, the evidence of record established that (1) there would be irreparable harm to the petitioner in the absence of relief -- specifically that many of the victims of the alleged discrimination would either retire or move away in search of other employment; (2) there was minimal potential harm to Mammoth, which had initially argued that it may have to lay off some present employees to accommodate the alleged discriminatees, but had, according to the court, subsequently conceded that no such layoffs were necessary.

Next, the Court rejected Mammoth's argument that the delay between the allegedly unfair labor practices and the petition for § 10(j) relief rendered such relief improper. The Court indicated that it was disturbed by the 18 month delay, but that "delay is an unfortunate reality in any matter before the Board" and that Mammoth's "litigation tactics" had contributed to the delay. While the Court held that delay was a relevant factor, it noted that the District Court had properly considered the issue when weighing the respective harms. Therefore, the Fourth Circuit found no error in the District Court's ruling.

Finally, the Court addressed the Board's cross-appeal, in which it argued that additional relief should have been granted, including immediate recognition and bargaining obligations, and

rescission of any unilaterally imposed employment terms. The Fourth Circuit agreed with the District Court that, on the facts of the case, such relief was not necessary because Section 10(j) relief is "extraordinary" and should be "narrowly tailored." The Court did note, however, that on other facts, such relief may be appropriate.

**Speer v. Mountaineer Gas Company, 2009 WL 2255512 (N.D.W.Va 2009)**

**Labor Law Issues:**

**Preemption.** Whether a denial of long term disability ("LTD") benefits claim is preempted by the Labor Management Relations Act ("LMRA") because it requires interpretation of a collective bargaining agreement?

**Preclusive Effect of Prior Arbitration Decision.** Whether litigation of ERISA denial of benefits claim is precluded by an arbitrator's decision on the claim?

**Preemption.** Whether a plaintiff's claim of wrongful discharge based on union participation is preempted by the National Labor Relations Act ("NLRA")?

**Brief Summary:**

The Court held that the plaintiff's ERISA denial of LTD benefits claim was not preempted by the LMRA because it was a federal law claim that the plaintiff was permitted to bring under ERISA, the LMRA, or both. The Court also held, however, that the arbitration decision was binding and would not be overturned because the plaintiff did not show that the decision failed to draw its essence from the collective bargaining agreement. Finally, the Court held that the plaintiff's wrongful discharge claim, based on his participation in union activities, was clearly preempted by the NLRA.

**Facts:**

The plaintiff suffered a workplace injury on August 21, 2001. After exhausting his short term disability benefits, he began receiving long term disability benefits pursuant to a collective bargaining agreement. The plan administrator terminated those benefits on April 30, 2003, after determining that the plaintiff was able to return to work. The plaintiff appealed the decision and, on April 4, 2004, the plan administrator granted the appeal and extended his LTD coverage for a two year time period beginning July 29, 2002.

Pursuant to the collective bargaining agreement, the plaintiff filed a grievance, arguing that his benefits were prematurely terminated because the terms of a 1997 collective bargaining agreement entitled him to continue receiving LTD benefits until age 65. The matter proceeded to arbitration and the arbitrator determined that a 2002 agreement, not the 1997 agreement, controlled, and concluded that the plaintiff was not entitled to any additional LTD benefits.

The plaintiff filed suit in the United States District Court for the Northern District of West Virginia, alleging that the arbitrator's award was invalid because it was based on the wrong



collective bargaining agreement. He asserted three causes of action: (1) that he was wrongfully denied benefits under ERISA; (2) that he was wrongfully discharged in retaliation for union activities; and (3) that he was wrongfully discharged and that his LTD benefits were terminated because of his age. Mountaineer Gas moved to dismiss, arguing that all of the counts were time barred; that Count (2) was preempted by federal law; and that Count (3) must be dismissed for failure to exhaust administrative remedies.

### **Analysis and Holdings:**

**ERISA Denial of Benefits.** The Court addressed Count 1, the alleged wrongful denial of benefits, first. The Court rejected Mountaineer Gas's argument that this count was subject to the three month statute of limitations under the Federal Arbitration Act. The Court found that the count was independent of the grievance procedure and that the ten year statute of limitations on written contracts was therefore applicable.

The Court next rejected Mountaineer Gas's argument that the denial of benefits claim was preempted by Section 301 of the LMRA because it required interpretation of a collective bargaining agreement. According to the Court, the plaintiff asserted "an independent federal claim under ERISA, not a state law claim. Where a claim for denial of benefits arises from an ERISA plan established by a collective bargaining agreement, such claim may be brought under ERISA, the LMRA, or both statutes."

The Court then addressed the merits of the cause of action and essentially treated the issue as an appeal of the arbitration decision. "In an ERISA action for denial of benefits, where the rights asserted are created by a collective bargaining agreement which requires arbitration of disputes, and where no procedural deviation in the arbitration process is alleged, the arbitration decision is to be accorded the same weight as it would receive in an action under § 301 of the LMRA. . . . In such cases, an arbitration decision is binding if it draws its essence from the collective bargaining agreement." The Court noted that the plaintiff had not argued that the arbitrator's decision violated public policy, reflected the arbitrator's own notions of right or wrong, or failed to draw its essence from the contract. And, to the extent the plaintiff argued that the arbitrator's decision failed to draw its essence from the contract because he referred to the wrong contract, the Court held that "asserted legal error is precisely the kind of issue, which, once decided by an arbitrator, is not subject to judicial review. Therefore, this Court finds that the arbitrator's decision is valid and binding." Consequently, the Court granted Mountaineer Gas's motion to dismiss the ERISA denial of benefits claim.

**Retaliation for Union Activities.** The Court next addressed Count (2), in which the plaintiff alleged that he was discharged in retaliation for his participation in union activities. The Court agreed with Mountaineer Gas that this claim was preempted by the National Labor Relations Act, finding that the plaintiff's "claim of wrongful discharge clearly falls within the scope of § 8 of the NLRA."

**Age discrimination.** The Court agreed with Mountaineer Gas that the plaintiff's age discrimination claim under the Age Discrimination in Employment Act was subject to dismissal because the plaintiff did not first file a claim with the Equal Employment Opportunity

Commission. Because the time period for filing such a claim had expired, and the Court had rejected the plaintiff's continuing violation argument, the Court dismissed the claim with prejudice.

**Narricot Industries, L.P. v. NLRB, 587 F.3d 654 (4th Cir. 2009)**

**Issues:**

(1) Whether a two-member quorum of the National Labor Relations Board ("NLRB") is empowered to issue decisions and orders?

(2) Whether substantial evidence supported the Board's determination that the employer's withdrawal of recognition from the union constituted an unfair labor practice?

(3) Whether substantial evidence supported the Board's finding that the employer's conduct would have tended to coerce employees to sign union resignation letters and therefore constituted an unfair labor practice?

(4) Whether the Board adequately justified its decision to impose an affirmative bargaining order?

**Brief Summary:**

The Fourth Circuit upheld all of the Board's determinations, denying the employer's petition for review, and granting the Board's petition for enforcement. The Court held that a two member quorum of the Board is empowered to issue decisions and orders, based on statutory authority allowing two members to constitute a quorum of any three member subgroup that has been properly delegated authority to act for the Board. In addition, the Court, citing the substantial deference that must be given to Board determinations, upheld the unfair labor practice findings, and the Board's imposition of an affirmative bargaining order.

**Facts and Procedural Background:**

Narricot is engaged in the business of manufacturing and dyeing narrow textile fabrics used to construct automobile seatbelts. On September 29, 2007, the Company withdrew its recognition of the Union representing its hourly workforce, effective October 2, 2007, the termination date of the parties' collective bargaining agreement. Narricot based its withdrawal of recognition on its receipt of a decertification petition signed by 64% of the bargaining unit employees. The Company then made several unilateral changes to the terms of its hourly employees' employment, including eliminating the "double time" overtime premium provided for in the last collective bargaining agreement.

The Union filed several unfair labor practice charges, alleging that the Company violated Section 8(a)(1) of the National Labor Relations Act ("NLRA" or "the Act") by (1) promising employees increased benefits if they removed the Union as their bargaining representative, (2) soliciting employees to sign the decertification petition, (3) providing unlawful assistance to

employees in the circulation of the petition, and (4) soliciting employees to separately withdraw from the Union. The Union also alleged that the Company violated Section 8(a)(5) by withdrawing recognition from the Union and then unilaterally implementing changes in the wage, benefits, and other conditions of employment.

After a three day hearing, the Administrative Law Judge concluded that Narricot had engaged in multiple unfair labor practices and recommended an Order requiring the Company to cease and desist from such practices, including its refusal to recognize and bargain with the Union, and to rescind all unilateral changes to wages and other conditions of employment. Narricot filed exceptions with the Board.

The Board, acting through a two member quorum, issued a decision that affirmed, with modification, the ALJ's decision, and adopted, with modification, the ALJ's recommended Order. According to the Board, "we agree with the judge that [Narricot] violated Section 8(a)(5) of the Act by withdrawing recognition from the Union and that an affirmative bargaining order is the appropriate remedy for this violation." The Board also affirmed the ALJ's decision that the Company had violated Section 8(a)(1) by "soliciting employees to resign their union membership and to revoke their dues checkoff authorizations." Narricot petitioned the Fourth Circuit for review and the Board cross-applied for enforcement.

#### **Analysis and Holdings:**

**Two member board.** The Court first addressed whether a two member board properly constituted a quorum with authority to make decisions and orders. The Court looked to the language of Section 3(a) of the Act:

[t]he Board is authorized to delegate to any group of three or more members any or all of the power which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

29 U.S.C. § 153(b).

The Court found that four members of the Board had lawfully delegated all of the Board's authority to a three member group in December 2007, in accordance with Section 3(b)'s "delegation provision." And, according to the Court, when the terms of one of those members expired, the two remaining members lawfully constituted a quorum under the last sentence of Section 3(b). "Under the plain and unambiguous text of § 3(b), therefore, the designated three-member group was empowered to act with a two-member quorum." The Court noted that the Seventh and Fourth Circuits had reached the same conclusion, but that the D.C. Circuit had reached the opposite conclusion in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 472-73 (D.C. Cir. 2009).

**Unfair labor practice determinations.** The Court first noted that the Board's rulings are entitled to deference when they are "rational and consistent" with the Act and Board precedent, citing *NLRB v. Air Contact Transp., Inc.*, 403 F.3d 206, 210 (4th Cir. 2005). "We are always obliged to defer to the Board 'where it has chosen 'between two fairly conflicting views, even [if we] would justifiably have made a different choice had the matter been before [us] de novo.'" (Citations omitted.) It then addressed the Board's finding that Narricot's withdrawal of recognition from the Union contravened § 8(a)(5) of the Act because Narricot had engaged in unfair labor practices prohibited by § 8(a)(1). The Court first noted that an employer is entitled to withdraw its recognition of a union where it can show, by a preponderance of the evidence, that the union had, in fact, lost majority support at the time the employer withdrew recognition. Here, the Court noted that the Board had found that Narricot relied solely on the decertification petition as proof that the Union had lost majority support. According to the Court, however, where an employer engages in conduct designed to undermine support for the union and impermissibly assists in a decertification effort, then the resulting decertification petition is considered tainted and does not provide a basis for withdrawing recognition. The Court summarized the evidence which the ALJ and the Board had found demonstrated exactly such impermissible conduct by Narricot:

As detailed by the Judge, both Human Resource Manager Kris Potter and Supervisor Eric Hayes actively participated in the decertification process. After employee Henry Vaughan asked for information about how to oust the Union, Potter prepared a decertification petition, gave it to Vaughan, and told him that about 220 signatures were needed. Potter also gave copies of the petition to employee Shirley Lewis and to intern Anja Baumann, directing them to return the signed petition to him. In addition, after giving Baumann a list of unit employees, Potter told her that about 200 signatures were needed on the petition. At the end of each day that she solicited signatures, Baumann returned copies of the petition to Potter pursuant to his instructions. According to Baumann, Potter would express approval and tell her that he needed more signatures. Finally, Supervisor Hayes told employee Willie Mitchell that employees would receive a pay raise if the Union were decertified and that Mitchell could sign a copy of the petition on the desk in Hayes' office.

Narricot argued that this evidence demonstrated only that it provided "ministerial aid" to the decertification effort, which is perfectly acceptable, according to *See E. States Optical Co.*, 275 NLRB 371, 372 (1985). The Fourth Circuit gave deference to the Board's findings in this regard. "We cannot say, in light of the record as a whole, that the Board lacked substantial evidence to find that Narricot's conduct in this case crossed the line beyond mere ministerial assistance."<sup>3</sup> Therefore, the Court enforced the Board's decision in this regard.

---

<sup>3</sup> The Court noted that there was additional evidence, beyond that cited above, which demonstrated that Narricot's efforts went beyond ministerial aid. "For instance, after Baumann signed the petition, Vaughan suggested that Baumann speak with Potter if she were interested in helping collect signatures. Baumann then met with Potter, advised him that she had just signed the petition . . . [Potter] gave Baumann a blank copy of the petition and a list of

Next, the Court considered the Board's determination that, because the objective value of the decertification petition was tainted by Narricot's unlawful participation, it was "unnecessary to pass on whether the petition was tainted under the standards set forth in *Master Slack Corp.*, 271 NLRB 78, 84 (1984)."

Narricot argued that the Board ignored its long-standing precedent by not examining whether there was a causal connection between the unfair labor practices and the decertification effort. The Board countered that it was not required to undertake such an examination because there was evidence of direct assistance by Narricot in the decertification effort.

According to the Court, *Master Slack* "established a rule intended to ensure a causal link between the decertification efforts and other unfair labor practices distinct from any unlawful assistance by the employer in the actual decertification petition. . . . Thus, where, as here, the unfair labor practices identified by the Board are directly related to the decertification effort, the Board need not make a specific causation finding under the four-factor *Master Slack* test." Noting that it must generally defer to the Board's legal determinations, so long as they are rational and consistent with the Act, the Court held that "the Board did not err in analyzing the connection between Narricot's unfair labor practices and the decertification petition underlying its withdrawal of recognition from the Union."

The Court next addressed the Board's affirmance of the ALJ's ruling that Narricot violated Section 8(a)(1) by soliciting employees to resign their Union memberships and to revoke their dues checkoff authorizations. Narricot argued that its efforts were prompted by requests for assistance by employees. The Court noted that the relevant inquiry is "whether the employer's conduct would have had a reasonable tendency to intimidate in light of the totality of the circumstances." The Court then looked at the evidence of record that Narricot not only prepared revocation letters for employees, but "presented the letters to the employees in such a way that would have tended to make them feel coerced to sign, and then mailed the letters to the Union by certified mail at its own expense." Under these circumstances, the Court refused to disturb the Board's decision on this issue.

**Bargaining order remedy.** Finally, the Court examined the Board's determination that an affirmative bargaining order, with an implicit bar on further decertification efforts for a reasonable period of time, was a reasonable remedy. Narricot argued that such a ruling "trounces upon [employees'] § 7 rights and forces employees to be represented . . . even if the employees no longer want to be represented." The Court first noted that the Board has broad discretion in fashioning a remedy. Thus, "[w]e must enforce its choice unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [Act]." The Court next observed that the Board had carefully balanced the following factors adopted by the D.C. Circuit for justification of an affirmative bargaining order: (1) the employees' § 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are

---

employee names . . . When one employee asked Baumann how the employee could remove her name from the petition, Baumann advised the employee that she would have to talk with Potter because he had the petitions."

adequate to remedy the violations of the Act." *See Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 738 (D.C.Cir. 2000).

Regarding the first factor, the Board explained that Narricot had "committed unfair labor practices both before and after its unlawful withdrawal of recognition that manifested its disregard for employees' Section 7 rights. . . . Under these circumstances, it is only by restoring the status quo ante and requiring [Narricot] to bargain with the Union for a reasonable period of time that employees' Section 7 rights to union representation can be vindicated."

As for the second factor, the Board "observed that an affirmative bargaining order would serve the Act's purposes of "fostering meaningful collective bargaining and industrial peace." In regards to the last factor, the Board "observed that the only alternative remedy -- a cease and desist order alone, would be inadequate "because it would allow another challenge to the Union's majority status before the employees had a reasonable time to regroup and bargain with [Narricot]." According to the Board, the circumstances of the case outweighed the temporary impact on the employee's Section 7 rights. Consequently, the Court concluded that, given the Board's careful consideration of the remedy, and the deference with which that determination is entitled, the bargaining order would be enforced.